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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, et al.,
Petitioners,

DIVISION OF OIL, GAS AND MINING,
Respondent, and

ALTON COAL DEVELOPMENT, LLC, and KANE COUNTY, UTAH,
Intervenors-Respondents.

Docket No. 2009-019
Cause No. C/025/0005

PETITIONERS' OPPOSITION TO ACD'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON CULTURAL/HISTORIC AND AIR QUALITY ISSUES

In their request for agency action, Petitioners alleged facts that if proven true establish that the Division of Oil, Gas and Mining ("Division") failed to fulfill its legal obligations related to the protection of cultural/historic resources and air quality. The Board refused to dismiss Petitioners' cultural/historic and air quality claims for failure to

state a claim. Board of Oil, Gas and Mining, *Order Concerning Motions to Dismiss* (February 18, 2010) at 2, 4, 10. The Board's regulations provide an unambiguous right to Petitioners to present evidence at a hearing to establish the facts necessary to support their claims. The regulations do not require Petitioners to submit evidence in order to secure the right to an evidentiary hearing. As such, the Board lacks authority to grant Alton Coal Development's ("ACD's") request for summary judgment. The Division has not contested Petitioners' right to present evidence at a hearing following the Board's denial of the Division's motion to dismiss.

The Board cannot fulfill its responsibilities under Utah Code Ann. § 40-10-14(3) and UT ADC R645-300-200 without a hearing to resolve key facts related to the Division's review of cultural/historic resources and air quality. For example, the Board must determine if the Division made a determination of eligibility and effect for any cultural/historic resources outside of the permit area. The Board must also determine whether the facts required the Division to evaluate and address the effects of the Coal Hollow Mine on the Panguitch National Historic District. The Board must also determine whether the Division of Air Quality provided the Division of Oil, Gas and Mining an evaluation of the effectiveness of the Fugitive Dust Control Plan for the Coal Hollow Mine prior to the approval of the mine permit. Contrary to ACD's claims, Petitioners do not seek to address issues at the upcoming hearing that were not raised in their request for agency action.

I.
Petitioners are Entitled to an Evidentiary Hearing.

The statutes and regulations that govern (1) the powers and authority of this Board and (2) the conduct of formal adjudicative proceedings on administrative review of

decisions of the Division to approve applications for permits to conduct surface coal mining and reclamation operations collectively impose a mandatory, non-discretionary duty on this Board to conduct an evidentiary hearing upon the demand of any party to such proceedings. Evidentiary hearings are necessary to permit any requesting party to, among other things, cross-examine any other party and the witnesses who provide evidence at the behest of another party. Because this Board is obligated by statute to afford parties to formal adjudicatory proceedings the right of cross-examination, the Board has no authority, absent the waiver of that right by all parties, to grant summary judgment to any party, either in whole or in part. Petitioners have not and will not waive their right to cross-examine in this proceeding.

This Board's authority to conduct formal administrative proceedings to review the Division's coal mining permit approval decisions is governed by Utah Code § 40-10-6.7(2), which provides that:

> (a) (i) Formal adjudicative proceedings shall be conducted by the division or board under this chapter and shall be referred to as hearings or public hearings.
> (ii) The conduct of hearings **shall be governed by rules adopted by the board** which are in accordance with Title 63G, Chapter 4, Administrative Procedures Act.
> (b) Hearings under this chapter **shall be conducted in a manner which guarantees** the parties' due process rights. This includes:
> (i) the right to examine any evidence presented to the board;
> (ii) **the right to cross-examine any witness**; and
> (iii) a prohibition of ex parte communication between any party and a member of the board.
> (c) A verbatim record of each public hearing required by this chapter shall be made, and a transcript made available on the motion of any party or by order of the board.

(Emphasis added.) Additionally, Utah Code § 40-10-14(3), which also governs proceedings following a decision of the Division to approve a coal mine permit application, provides as follows:

> Upon approval of the application, the permit shall be issued. If the application is disapproved, specific reasons shall be set forth in the notification. Within 30 days after the applicant is notified of the final decision of the division on the permit application, the applicant or any person with an interest which is or may be adversely affected may request a hearing on the reasons for the final determination. **The board shall hold a hearing pursuant to the rules of practice and procedure of the board** within 30 days of this request and provide notification to all interested parties at the time that the applicant is notified. Within 30 days **after the hearing** the board shall issue and furnish the applicant, and all persons who participated in the hearing, with the written decision of the board granting or denying the permit in whole or in part and stating the reasons.

(Emphasis added.)

Read together, these statutes require this Board to afford all litigants in formal adjudicative proceedings such as this one the opportunity to cross-examine other parties and any witness who provides evidence on behalf of another party. This obligation precludes the Board from awarding summary judgment to any party that, as ACD has done in this proceeding, unilaterally attempts to avoid an evidentiary hearing on any issue by presenting evidence through one-sided affidavits or declarations.

The fact that summary judgment procedure allows a party that opposes summary judgment to present counter-affidavits or declarations does nothing to cure the fatal defect in ACD's current motion: the right to cross-examine provides a unique opportunity to demonstrate, out of the mouth of hostile parties or witnesses themselves, the error, inadequacy, or bias in another party's evidence with a force that the counter-statements of a party's own witnesses often simply do not carry. Because the right to cross-examine is statutorily guaranteed in formal adjudicatory proceedings under the Board's organic

statute, the Board may not adopt summary judgment or any other procedural device that impairs or eliminates a party's right to cross-examine.

Petitioners acknowledge the statement in the Utah Administrative Procedures Act that:

> This chapter **does not preclude** an agency, prior to the beginning of an adjudicative proceeding, or the presiding officer during an adjudicative proceeding from granting a timely motion to dismiss or for summary judgment if the requirements of Rule 12(b) or Rule 56 of the Utah Rules of Civil Procedure are met by the moving party, except to the extent that the requirements of those rules are modified by this chapter.

Utah Code § 63G-4-102(4)(b) (emphasis added). The quoted language does not, however, authorize this Board to grant summary judgment in contravention of the statutory cross-examination right of litigants established under the Board's organic statute. Instead, the quoted language simply clarifies that nothing in the Utah Administrative Procedures Act bars entry of summary judgment in formal adjudicative proceedings. The quoted language, which applies to formal adjudicative proceedings generally, cannot reasonably be interpreted to trump the more specific provisions of this Board's organic statute, which concerns only the class of formal adjudicative proceedings that review approval of applications for permits to conduct surface coal mining operations and other matters arising under Utah's approved state regulatory program for implementing the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 ("SMCRA"). *State v. Hamblin*, 676 P.2d 376, 378 (Utah 1983) ("A specific statute controls a general one."); *see also Floyd v. Western Surgical Associates, Inc.*, 773 P.2d 401, 404 (Utah App. 1989) (citing *State v. Burnham*, 49 P.2d 963, 965 (Utah 1935)) ("Under general rules of statutory construction, where two statutes treat the same subject matter, and one statute is general while the other is specific, the specific provision controls.").

It is important to note that the Board's organic statute, unlike the Utah Administrative Procedures Act, does not establish a procedure for obtaining summary judgment or summary decision prior to an evidentiary hearing in formal adjudicative proceedings. Because express provisions for summary judgment or summary decision are very commonly included in civil procedural systems in the United States, including civil adjudications in the Utah state court system, *see* Utah R. Civ. P. 56 (describing when summary judgment may be granted), Fed. R. Civ. P. 56, 43 C.F.R. 4.1125 (authorizing federal administrative law judges to enter summary decision in administrative review proceedings under SMCRA), the absence of any authorization of summary judgment or summary decision in the Board's organic statute forcefully underscores the express statutory requirement that this Board afford every litigant the right of cross-examination and, consequently, that this Board conduct an evidentiary hearing in every instance unless all parties waive that right.

As mentioned earlier, the Board's organic statute does direct this Board to adopt procedural rules "which are in accordance with Title 63G, Chapter 4, Administrative Procedures Act." Tellingly, however, the procedural rules for formal adjudicative proceedings that this Board has adopted do not authorize summary judgment, presumably in recognition of the statutory cross-examination rights established in the organic statute. The fact that the Board's rules do not authorize summary judgment does not prevent them from being "in accordance with" the Utah Administrative Procedures Act because, as quoted above, that statute does not require agencies to authorize entry of summary judgment. Instead, the Utah Administrative Procedures Act simply clarifies that its provisions do not **preclude** agencies from entering summary judgments. For this reason,

the Board's regulation that reserves all rights, powers, and authority described in the Utah Administrative Procedures Act is not effective to empower this Board to issue summary judgments. Because the Utah Administrative Procedures Act does not itself grant any agency the right, power, or authority to grant summary judgment, reference to that statute as a source of summary judgment authority necessarily must fail.

Instead, the authority of any Utah agency to grant summary judgment in formal adjudicative proceedings must come, if at all, from its organic statute. For all the reasons explained earlier in this section, this Board's organic statute does not authorize entry of summary judgment. Instead, it establishes cross-examination rights that are flatly incompatible with summary judgment. Accordingly, due to the absence of statutory or regulatory authority to enter summary judgment, this Board must deny ACD's motions out of hand.

II.
A Hearing is Necessary for the Board to Resolve Key Facts Related to the Division's Compliance with its Legal Obligations to Protect Cultural/ Historic Resources and Air Quality.

Even if the Board finds that it has the authority to grant summary judgment in its review of coal mine permits, granting summary judgment here is unjustified. Summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c).

> As part of the inquiry, the court must apply an objective standard to determine whether a genuine issue of material fact remains. The objective standard seeks to find whether reasonable jurors, properly instructed, would be able to come to only one conclusion, or if they might come to different conclusions, thereby making summary judgment inappropriate.

Clegg v. Wasatch County, 2010 WL 391855, 4 (Utah 2010) (citing *Newman v. White Water Whirlpool*, 197 P.3d 654 (Utah 2008)). As explained below, depositions and the documents produced as part of these depositions establish a genuine issue as to several material facts related to the Division's review of cultural/ historic resources and air quality. Moreover, ACD is not entitled to judgment as a matter of law.

A. Cultural/ Historic Resources

The Division's regulations require each permit application to analyze potential adverse impacts from the proposed coal mining operations to "cultural and historic resources listed or eligible for listing in the National Register of Historic Places and known archaeological sites within the permit and adjacent areas." UT ADC R645-301-411.140. The regulations require the Division to make an explicit finding that it "has taken into account the effect of the proposed permitting action on properties listed on and eligible for listing on the National Register of Historic Places." UT ADC R645-300-133.600. This finding must be supported by "information set forth in the application or from information otherwise available that is documented in the approval." UT ADC R645-300-133. Furthermore, the Division's regulations require that a mine permit application include a plan to prevent or minimize adverse impacts to "publicly owned parks or places listed on the National Register of Historic Places." UT ADC R645-301-411.142. Several genuine issues of material fact exist related to the Division's cultural/ historic resource review.

1. Failure to Identify and Evaluate Adjacent Area When Making Determination of Eligibility and Effect.

The Division's cultural/historic review consists of three components. First, the

Division must identify the cultural and historic sites that may be eligible for protection and may be affected by the proposed mine. The permit file indicates that ACD's inventory of cultural and historic sites was based on a Cultural Resource Inventory and a Paleontological Survey each dated June 14, 2007. Division of Oil, Gas and Mining, Technical Analysis (Oct. 15, 2009) [hereafter "*Final TA*"] at 18, attached as Exh. 1. The inventory of sites was later incorporated into the Cultural Resource Management Plan (May 23, 2008) ("CRMP") developed by Montgomery Archeological Consultants ("MOAC") at the request of ACD and the Division. *See* CRMP, at 4 (Figure 2), attached as Exh. 2.

Second, the Division must make a determination of eligibility and effect. The Division made this determination and submitted it to the State Historic Preservation Office for concurrence on November 2, 2007. Letter from Pamela Grubaugh-Littig, Permit Supervisor to Dr. Mathew Seddon, Deputy State Historic Preservation Officer (Nov. 2, 2007), *Decision Memo Requesting State Historic Preservation Office on Eligibility and Effect Determination*, attached as Exh. 3. This determination of eligibility and effect was limited to the permit area. The fifteen sites identified in the Division's November 2, 2007 letter to the SHPO all overlap with the permit area in some way. MOAC, Cultural Resource Inventory of Alton Coal Developments (March 10, 2006), at 3 (Figure 1), attached as Exh. 4. Nothing in the record indicates that the Division submitted any information to the SHPO regarding ***any*** adjacent area in addition to the permit area to support its determination of eligibility and effect. Deposition testimony of Jody J. Patterson, Principal Investigator, with MOAC confirms that the archeological work completed and submitted to the Division to support its determination of eligibility

and effect was limited to the permit area. Excerpts of Rule 30(b)(6) Deposition of Jody Patterson (Feb. 25, 2010) at 25-26, attached as Exh. 5 ("Q: [D]id Montgomery Archeological Consultants make an evaluation of the effect of the Coal Hollow Mine as proposed in the permit application to the division on any historic resources that are completely outside the permit area? A: No.").

Third, after identifying the sites that would be adversely affected by the proposed Coal Hollow Mine, the Division must ensure a mitigation plan is in place to address any adverse effects. The Division requested the SHPO's concurrence on this mitigation plan, the Data Recovery Plan (May 23, 2008), on July 10, 2008. Letter from Daron Haddock, Permit Supervisor, to Wilson Martin, State Historic Preservation Officer (July 10, 2008) re. *Decision Memo Requesting State Historic Preservation Office Concurrence on CRMP and Data Recovery Plan Determination*, attached as Exh. 6. The Data Recovery Plan developed by MOAC did not address any sites wholly outside the permit area. Excerpts of Rule 30(b)(6) Deposition of Jody Patterson (Feb. 25, 2010) at 24, attached as Exh. 5 (Q: "Did Montgomery Archeological Consultants look at the lease by application area in preparing the data recovery plan? A: No."). The Data Recovery Plan addressed the seven sites identified in the determination of eligibility and effect that the Division determined would be adversely affected by the Coal Hollow Mine. Excerpts of Rule 30(b)(6) Deposition of Daron Haddock (Feb. 22, 2010) at 45-46, attached as Exh. 7 ("Q. So was the data recovery plan developed to address the effects of the seven archeological sites that were identified in the previous eligibility and effect determination? A. To my knowledge, yes.").

In sum, evidence from the permit record maintained by the Division and

deposition testimony taken by Petitioners indicate that the Division failed to identify and evaluate any adjacent area requesting concurrence from the SHPO on its determination of eligibility and effect and subsequent mitigation plan for the Coal Hollow Mine. Such evidence precludes granting ACD's motion for summary judgment on the cultural/ historic resource issues. Presentation of testimony and exhibits at the hearing will assist the Board in determining whether the Division did indeed fail to identify and evaluate any adjacent area as alleged by Petitioners. Failure to identify and evaluate an adjacent area *in addition to* the permit area when conducting the cultural/historic resource review for the Coal Hollow Mine violates the unambiguous language of UT ADC R645-301-411.140.

2. Failure to Include Panguitch National Historic District in the Adjacent Area.

Even if the Board determines that the Division did identify and evaluate an adjacent area in making its determination of eligibility and effect, the Division failed to meet its cultural/ historic review obligations by failing to include the Panguitch National Historic District in that area. A hearing is necessary for the Board to resolve two key factual disputes: (a) whether the Division determined that the Panguitch National Historic District was not part of the adjacent area that required analysis prior to approving the permit; and (b) whether the SHPO concurred in this determination. ACD is not entitled to judgment as a matter of law that the public nature of Highway 89 for hauling coal precludes inclusion of Panguitch National Historic District in the adjacent area.

a. Whether the Division Determined that the Panguitch National Historic District was Not Part of the Adjacent Area that Required Analysis Prior to Approving the Permit

The permit record indicates that Division sought analysis of the Coal Hollow

Mine's impacts on the Panguitch National Historic District. In a letter to Chris McCourt, ACD Manager, dated May 9, 2008, Daron Haddock, Permit Supervisor wrote: "The Division has determined that there are some deficiencies that must be addressed before a determination can be made that requirements of the R645 Coal Mining Rules have been met, and the Division can initiate consultation with the State Historic Preservation Office. Those deficiencies are listed as an attachment to this letter." Exh. 8. These deficiencies included: "Indirect effects, such as transportation should be described here." *Id.* at 4. The deficiencies also specifically included revising the "Effected (sic) Environment" to "[i]nclude in Table 2 other cultural resources such as the National Register of Historic Places Historic District in Panguitch." *Id.* Moreover, the Cultural Resource Management Plan explicitly includes the transportation route through Panguitch as part of the "Affected Environment." CRMP, at 3, attached as Exh. 9 ("The reasonably foreseeable transportation route (Figure 3) extends west from Alton on CR-10/ Cistern Road, north along US-89 through the NRHP Historic District in Panguitch to SR-20."). *See also*, CRMP, at 5 (Figure 3) attached as Exh. 10.

No dispute exists as to whether such analysis was completed. The Cultural Resource Management Plan documents the intent to do the analysis, but contains no actual analysis of the mine's impacts on the Panguitch National Historic District or mitigation for addressing the impacts. Excerpts of Rule 30(b)(6) Deposition of Daron Haddock (Feb. 22, 2010) at 51, attached as Exh. 7 ("Q. Did the division provide any information to the State Historic Preservation Office related to the impacts of the mine on the Panguitch National Historic District? A. No."). In deposition testimony, Permit Supervisor Daron Haddock confirmed that the Division did not address the impacts of the

proposed Coal Hollow mine on the Panguitch National Historic District. *Id.* at 53 ("Q. Let me ask you whether the division made any determination related to the impacts of the proposed mine on the Panguitch National Historic District. A. The division viewed the Panguitch National Historic District as being outside of the adjacent area, and so we did not make any determination as to the impacts of the coal transportation through that area.").

In defending its action to approve the Coal Hollow Mine without analysis addressing the impacts of the hauling of coal from the Coal Hollow Mine through the Panguitch National Historic District, the Division now argues that it determined that it did not have to complete such analysis. The Division argues that it "did not include PNHD in its analysis of cultural and historic resources because the PNHD is not located in the permit area and is not located in an adjacent area for cultural and historic resources." DOGM, *Memorandum in Support of Motion to Dismiss Certain Claims* (Jan. 13, 2010), at 3. Nothing in the permit record documents this determination. Instead, as explained above, the record indicates that analysis of the mine's impacts on the Panguitch National Historic District was necessary prior to the Division's approval. Whether the Division required ACD to provide analysis of the Panguitch National Historic District and then approved the Coal Hollow Mine permit without it is a genuine issue of material fact that precludes summary judgment.

b. Whether the SHPO Concurred in a Determination to Exclude the Panguitch National Historic District from the Permit Analysis

Regardless of the Division's position prior to permit approval, the SHPO believed that the impacts of the mine on the Panguitch National Historic District needed to be addressed ***before*** the Division approved the Coal Hollow mine permit. Without such

analysis, the permit application was incomplete and should not have been approved. UT ADC R645-300-133.100. In a May 5, 2008 email to Joe Helfrich, the Division staff member who served as the point person for the cultural/ historic resource review, Matthew Seddon, the Deputy State Historic Preservation Officer, writes: "I've brought our buildings specialists, primarily Chris Hansen, in the loop. He can help you with analysis of effects to Panguitch." Exh. 11. On May 6, 2008, Mr. Seddon sent a memorandum to Joe Helfrich, UDOGM, stating:

> We recommend that prior to submitting the plan as part of a consultation package under Utah Code 9-8-404 that UDOGM **ensure** that the following changes are made:
>
> . . .
>
> Effected (sic) Environment – Pages 1 on – As long as we are commenting on more substantial matters, we note that the correct term is "Affected Environment." This section needs to include the entire project area, including potential transportation routes, with maps, rather than focusing solely on the archaeology. . . . Other cultural resources such as the National Register of Historic Places Historic District in Panguitch should be mentioned in Table 2.

Memorandum from Matthew Seddon, Deputy Staff Historic Preservation Officer and Lori Hunsaker, Public Lands Policy Coordination Office to Joe Helfinch, UDOGM, Comments on Alton Coal Cultural Resource Management Plan (CRMP) and Data Recovery Plan (07-1471) (May 6, 2008) [hereafter "*SHPO Memo*," Exh. 12 (emphasis in original). As indicated in this SHPO memo to the Division, the State Historic Preservation Office viewed analysis of the mine's impacts on the Panguitch National Historic District as a component of the Division's duties under Utah Code § 9-8-404.

The Division cannot lawfully approve the Coal Hollow Mine without the SHPO's concurrence in the decision not to analyze and address the mine's impacts on the Panguitch National Historic District. UT ADC R645-301-411,142 (Division findings

must "present evidence of clearances by the SHPO"). *See also* UT ADC R645-300-133 ("No permit application or application for a permit change will be approved unless the application affirmatively demonstrates and the Division finds, in writing . . . [that] the application is complete and accurate."). Whether the SHPO provided such concurrence is a genuine issue of material fact that precludes summary judgment.

c. Whether the Use of Highway 89 to Haul Coal from the Coal Hollow Mine Requires the Inclusion of the Panguitch National Historic District in the Adjacent Area

The Division's regulations require each permit application to analyze potential adverse impacts from the proposed coal mining operations to "cultural and historic resources listed or eligible for listing in the National Register of Historic Places and known archaeological sites within the permit and adjacent areas." UT ADC R645-301-411.140. "Adjacent area" includes an area that "reasonably could be expected to be adversely impacted by proposed coal mining and reclamation operations." UT-ADC R645-100-200. "Reasonably foreseeable transportation routes" appropriately fall within the adjacent area to be analyzed for impacts of the proposed mine on cultural and historic resources. The hundreds coal truck trips through the Panguitch National Historic District each day projected as part of the Coal Hollow Mine operations would not occur but for the mine. The law on this issue demands that the Panguitch National Historic District be included in the cultural/ historic resource analysis of the Coal Hollow Mine permit, rather than excluded as ACD argues. ACD is not entitled to judgment as a matter of law.

The Division must interpret the term "adjacent area" in a way that is consistent with state law. Utah statutes impose an explicit legal obligation on all state agencies including the Division here to "take into account the effect . . . on any historic property"

before "expending any state funds or approving any undertaking." Utah Code § 9-8-404(1)(a). "Effect" is not limited to direct effects, but includes indirect effects such as transportation. *SHPO Memo*, Exh. 12 at 1. The language in the Utah Code to "take into account the effect" of a state undertaking is the same as the language applicable to federal agencies under the National Historic Preservation Act "to take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470f. Federal regulations include "indirect" effects within the meaning of "effect." 36 C.F.R. § 800.16(d).

When evaluating oil and gas leases, federal courts have concluded that "effects" reach beyond the permit area and can include impacts related to transportation over routes extending significant distances from the site of extraction. *Wilson v. Block*, 708 F.2d 735, 754 (D.C. Cir. 1983) (upholding area of potential effect determination that included a project's access road). The analysis required under the NHPA is not limited to the lease parcel boundaries, but must include access roads. *Colo. River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1437 (C.D. Cal 1985) (rejecting use of a project's "permit area" as the "area of potential effect" for Section 106 consultation). Given the similarity of the obligation under Utah Code § 9-8-404(1)(a) and the language in NHPA, the Division should have included reasonably foreseeable transportation routes from the Coal Hollow mine in the required cultural/ historic resource review as federal courts have included access roads in the cultural/ historic review required for oil and gas lease parcels.

The Division must also interpret the term "adjacent area" in a way that is consistent with the NHPA because the Division operates under a grant of authority from

the Office of Surface Mining Reclamation and Enforcement ("OSM"). OSM is responsible for implementing the Surface Mining Control and Reclamation Act ("SMCRA"). 30 U.S.C. §1201 *et seq*. Even where OSM delegates primary authority for the regulation of coal mining to a state as it has done in Utah, the state program must be consistent with federal laws like SMCRA and the NHPA. *Indiana Coal Council, Inc. v. Lujan*, 774 F. Supp. 1385, 1403 (D.D.C. 1991). *See also*, 16 U.S.C. § 470w(7) (defining "undertaking" as any "project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including- . . . (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency").

Contrary to ACD's arguments (ACD SJ Motion at 13-14), the public road exclusion discussed in *Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement*, 659 F.Supp. 806, 812 (W.D. Va. 1987) does not govern the issue at hand. *Harman* concerns whether public roads used for hauling coal fall within the regulatory definition of "affected area" and thus require those who use them to obtain a SMCRA permit to do so. Here, Petitioners do not argue that Highway 89 is part of the "affected area" of ACD's mine. Accordingly, Petitioners do not contend that ACD must obtain a SMCRA permit to haul coal on Highway 89.

Instead, Petitioners argue that Highway 89 lies within the larger "adjacent area" of ACD's mine because Highway 89 is quite plainly an area of land that "reasonably could be expected to be adversely impacted by proposed coal mining and reclamation operations." UT-ADC R645-100-200. Given that the Coal Hollow Mine would be the sole source of coal trucks running through the Panguitch National Historic District, the

applicable Utah regulations demand that the Division evaluate the impacts of ACD's mine on cultural and historic resources there regardless of whether Highway 89 meets the regulatory definition of "affected area" and thus requires a SMCRA permit – an issue that Petitioners do not address because it is not pertinent to their claim.

Simply put, the Division's permit regulations must be read consistently with Utah Code § 9-8-404 and with the federal National Historic Preservation Act. Excluding the impacts of the hundreds of new trips by coal trucks on Highway 89 through the Panguitch National Historic District would defeat the intent of both Utah Code § 9-8-404 and the NHPA.

Alternatively, even if the public road exclusion in the regulatory definition of "affected area" did apply to this issue – which it does not – the exclusion turns on a factual inquiry that precludes granting ACD's summary judgment motion. Contrary to ACD's argument (ACD SJ Motion at 14), whether the road used to haul the Coal Hollow Mine is an existing public highway is not the only relevant fact in determining whether the exclusion applies. In *Harman*, the court went through a careful examination of the specific facts in the case, including testimony presented at a hearing before the court, to reach its conclusion that the road did not require a permit. 659 F.Supp. at 812. Similar procedure would be appropriate here.[1]

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[1] ACD appears to be throwing the kitchen sink at the Board in arguing that Petitioners are not entitled to adjudication of their claim that the Division failed to evaluate an adjacent area because no specific cultural resources are identified outside the permit area. ACD SJ Motion at 18-19. First, the job of identifying and addressing cultural/ historic resources in the adjacent area affected by the Coal Hollow Mine is the Division's. Failure to do so results in an incomplete permit in violation of UT R645-300-133.100 and UT ADC R645-301-411.140. As explained above, Petitioners have offered sufficient evidence to create a genuine dispute as to whether the Division made a determination of eligibility and effect for any adjacent area in addition to the permit area. Second, Petitioners have identified at least one area that should have been included in the adjacent area and was not – the Panguitch National Historic District.

B. Air Quality

The Division's regulations require that each coal mine permit application include a fugitive dust control plan. UT ADC R645-301-423.200 and UT ADC R645-301-424. All coal mine permit applications require a fugitive dust control plan regardless of size. UT ADC R645-301-423.200 and UT ADC R645-301-424. The Division's regulations include two specific requirements for mines with projected production rates exceeding 1,000,000 tons of coal per year. UT ADC R645-301-423. First, the fugitive dust control plan must meet the specifications of UT ADC R645-301-244.100 and UT ADC R645-301-244.300. Second, the permit application must include "an air quality monitoring program to provide sufficient data to evaluate the effectiveness of the fugitive dust control practices . . . to comply with federal and Utah air quality standards." UT ADC R645-301-423.100. ACD has sought authorization for a mine that will produce approximately 2,000,000 tons of coal annually. ACD SJ Motion at 2. As explained below, genuine issues of material fact exist regarding whether ACD's permit application included a fugitive dust plan adequate to meet the requirements of UT ADC R645-301-423.

The unambiguous language of the Division's own regulations prohibits approval of a permit application that lacks a complete and sufficient fugitive dust control plan. The Division has acknowledged that it has not evaluated the effectiveness of the fugitive dust control plan. Priscilla Burton, Technical Memorandum (Oct. 15, 2009), at 24-25, attached as Exh. 13 ("The information provided in the application may meet the requirements of the Air Quality rules for R645-301-423.200. However, the Division does not provide training for permitting staff or inspectors in the application of EPA Method 9.

Consequently, it is recommended that the Division request that the Utah DAQ evaluate this fugitive dust control plan prior to issuance of the air quality permit."). Instead, the Division defers to an evaluation by the Utah Division of Air Quality ("DAQ") ***that has not yet occurred***. Excerpts of Rule 30(b)(6) Deposition of Priscilla Burton (Feb. 22, 2010) at 78, attached as Exh. 14. ("Q. Do you have experience in evaluating monitoring protocol for fugitive dust? A. No, I don't. And that's my point in the finding. Q. So will it be, then, the division of air quality that evaluates the effectiveness of the fugitive dust control plan, including the monitoring protocol? A. Yes, I hope that that is the case."). If the Division chooses to rely on an air quality permit granted by the DAQ to provide the necessary fugitive dust controls, it must wait until such air quality permit is approved before approving ACD's permit application.

1. Failure to Evaluate Monitoring

ACD's Fugitive Dust Control Plan relies on "EPA Method 9" for monitoring the effectiveness of the proposed fugitive dust controls. On its face, this method is designed for monitoring the opacity of plumes from stationary sources. EPA, Emission Measurement Technical Information Center Test Method-009 (Oct. 25, 1990), attached as Exh. 15. In its motion for summary judgment, ACD asserts that the Division determined that Alton submitted an adequate fugitive dust control plan. ACD SJ Motion at 20. Yet, evidence in the permit record indicates otherwise. The Division explicitly acknowledged that it "does not have the expertise to evaluate the use of method 9." Email from Priscilla Burton to Jon Black re. Fugitive Dust Plan (Oct. 13, 2009), attached as Exh. 16. The Division's "finding" related to the fugitive dust control plan indicates that "[t]he information provided in the application ***may*** meet the requirements of the Air

Quality rules for R645-301-423.200." Exh. 13 (emphasis added). This language explicitly undercuts ACD's claim that the Division determined its fugitive dust control plan was adequate.

2. Need to Address Clarity of Night Sky

Contrary to ACD's claims (ACD SJ Motion at 23), ACD is not entitled to judgment as a matter of law on the night sky issue. The arguments by ACD to exclude the issue of the clarity of the night sky ignore the relevance of fugitive dust to visibility both during the day and at night. As indicated in its Order on the Motions to Dismiss, the Board also appears to have overlooked the relevance of fugitive dust to the clarity of night skies. Board of Oil, Gas and Mining, *Order Concerning Motions to Dismiss* (February 18, 2010) at 4. The Division's regulations contain an unambiguous requirement to include a fugitive dust control plan in the permit application. UT ADC R645-301-423.200. The control plan must ensure that "all exposed surface areas will be protected and stabilized to effectively control erosion and air pollution attendant to erosion." UT ADC R645-301-244.100. The unambiguous language of the Division's regulations requires that the control plan "effectively control . . . air pollution attendant to erosion." *Id.* Impacts to visibility both during the day and night are one type of air pollution attendant to erosion. In the words of the Forest Service, "Night sky quality is principally degraded by light pollution – emissions from outdoor lights that cause direct glare and reduce the contrast of the night sky – but atmospheric clarity as plays a role." Letter from Donna Owens, District Ranger, Powell Ranger District, Dixie National Forest, to Mary Ann Wright, Associate Director, Mining, Division of Oil, Gas, & Mining (May 9, 2008), attached as Exh. 17.

Potential impact to the clarity of the night sky is more than speculation by the Petitioners. Supervisors of both the Dixie National Forest and Bryce Canyon National Park raised concerns about the impact of the proposed Coal Hollow mine on the clarity of the night sky of the areas they manage. As indicated above, the District Ranger for Dixie National Forest wrote directly to the Division of Oil, Gas & Mining to raise these concerns. *See also*, Letter from Eddie Lopez, Supervisor of Bryce Canyon National Park, attached as Exh. 18. This letter was included in the record considered by the Division when evaluating the proposed Coal Hollow Mine application.

In fact, the Division itself in its Technical Analysis of the permit application acknowledged the need to address the clarity of the night sky. The Technical Analysis provides: "the Applicant has not discussed the effect on the night sky as seen from Bryce Canyon N.P. and the Dixie N.F. Therefore, this deficiency remains and must be addressed prior to receiving a recommendation for approval." *See Final TA* at 83, attached as Exh. 1.

The fact that the Bureau of Land Management is evaluating the quality of the night sky in conjunction with the draft environmental impact statement for the federal coal lease that ACD is seeking does not excuse the Division from its legal obligation to address the issue before approving its permit. Petitioners' arguments do not rely on the National Environmental Policy Act ("NEPA"). The Division has an independent legal obligation – separate from NEPA – to ensure that any coal mine permit it approves includes a fugitive dust control plan that "effectively control[s] . . . air pollution attendant to erosion." UT ADC R645-301-244.100; UT ADC R645-301-423.200.

At the very least, whether the clarity of night sky is "air pollution attendant to

erosion" is the kind of factual question the adjudicatory hearing provided for in the Board's regulations is designed to address. The Division's own staff in deposition testimony acknowledged the relevance of fugitive dust to the clarity of night skies. Excerpts of Rule 30(b)(6) Deposition of Priscilla Burton (Feb. 22, 2010) at 82-83, attached as Exh. 14 (Q: In your professional opinion as an environmental scientist at the division, is there a connection, is there a relation that the fugitive dust has related to the clarity of the night skies? A. They both would affect the clarity of the night skies, fugitive dust and lighting.").

III.
Petitioners Do Not Seek to Add New Issues to Their Request for Agency Action

In their Request for Agency Action, Petitioners alleged that "the Division acted arbitrarily, capriciously, and contrary to law in failing to withhold approval of ACD's inaccurate and incomplete permit application." Petitioners' Request for Agency Action (Nov. 18, 2009) (hereafter "Request for Agency Action") at 5. Citing UT ADC R645-301-411.140, Petitioners alleged that the Division failed to adequately analyze potential adverse impacts from the proposed coal mining operations to "cultural and historic resources listed or eligible for listing in the National Register of Historic Places and known archaeological sites within the permit and adjacent areas." Request for Agency Action, at 24.

ACD's characterization of the claims asserted in Petitioners' Request for Agency Action is false. ACD asks that the Board decline to consider evidence relating to the Division's failure to adequately evaluate the entire permit area because Petitioners' Request for Agency Action only claimed deficiencies "entirely *outside* of the permit

area." ACD SJ Motion at 17. In fact, Petitioners' Request for Agency Action clearly states that the "permit application . . . lacks adequate biological, cultural, and historical information *with respect to both the permit and adjacent areas*." Request for Agency Action at 5 (emphasis added).

Petitioners' Request for Agency Action is more than adequate under Utah's liberalized pleading rules to allow for the consideration of facts uncovered during the discovery process that bolster its claim that the permit application is incomplete. The Board's rules are substantially similar to the Utah Rules of Civil Procedure, which require that a complaint provide "fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved." *Mack v. Utah State Dept. of Commerce*, 221 P.3d 194, 199–200 (Utah 2009). In Utah, complaints "shall be so construed as to do substantial justice." Utah R. Civ. P. 8(f); *Busche v. Salt Lake County*, 26 P.3d 862, 864 (Ut. App. 2001). Relying on this principle, Utah courts support a broad reading of the complaint:

> [T]he fundamental purpose of the liberalized pleading rules is to afford parties the privilege of presenting whatever legitimate contentions they have pertaining to their dispute, subject only to the requirement that their adversaries have fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.

Consolidated Realty Group v. Sizzling Platter, Inc., 930 P.2d 268, 275 (Ut. App. 1996) (internal citations omitted). As a result of discovery, Petitioners are now able to identify more specifically the ways in which the permit application was inaccurate and incomplete with respect to the cultural/ historic resource review. ACD requests that the Board decline to consider such evidence. Granting such a request would work substantial

injustice by perverting Utah's notice pleading requirements and frustrating the discovery and hearing process to which Petitioners are entitled.

CONCLUSION

For the reasons stated herein, Petitioners request that the Board deny ACD's motion for summary judgment.

Dated: April 22, 2010

Respectfully submitted,

By: /s/ Sharon Buccino

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of April, 2010, I served a true and correct copy of **PETITIONERS' OPPOSITION TO ACD'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON CULTURAL/ HISTORIC AND AIR QUALITY ISSUES** to each of the persons listed below via e-mail transmission.

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